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COURT OF CRIMINAL APPEALS
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No. PD-0791-16

IN THE
TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS,
PETITIONER

V.

MARK BOLLES
RESPONDENT.

ON PDR FROM THE THIRTEENTH COURT
OF APPEALS

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Mr. Bolles was indicted on May 8, 2014, for 3 Counts of Possession of Child Pornography, all alleged to have occurred on February 18, 2014. Mr. Bolles was found Guilty by the Court of count 1 of Possession of Child Pornography, on September 18, 2014. He was found not guilty to count 2 and count 3 was dismissed by the State prior to trial. He was sentenced by the Court, to 2 years in the institutional division of the Texas Department of Corrections on October 3, 2014. A Notice of Appeal was filed on October 3, 2014.

A panel of the Thirteenth Court of Appeals heard oral argument and reversed the conviction. In doing so, they held that the evidence was insufficient to support the conviction because the full image does not depict a lewd exhibition of the genital and the cropped image does not depict a person who was under the age of eighteen at the time the image was made.

ISSUES PRESENTED

1. **Whether the Court of Appeals erred in concluding that the full image did not depict a lewd exhibition of the genital.**
2. **Whether the cropped image creates a entirely new image, and if it does, does the age at the time the new image was created control, even if the full image is not lewd.**

STATEMENT OF FACTS

On February 18, 2014, Mark Bolles, was at the public library in Corpus Christi, Texas. He was using the public computers viewing various websites. The librarian noticed Mr. Bolles to be viewing, what he believed to be, inappropriate images on the computer and he called law enforcement. When law enforcement arrived they took custody of Mr. Bolles cell phone which later was found to contain several of nude people. There were pictures of nude adult women, some photos of adult male genitalia, photos of works of art, and zoomed in photos of portions of those works of art. The image alleged in count one of the indictment was a zoomed in portion of a Photograph taken by Robert Mapplethorpe, named "Rosie", and is on display in the Guggenheim Art Museum in New York City. The image alleged in Count 2 of the indictment is a photograph taken by Jock Sturges, and is published in his book Life-Time.

SUMMARY OF THE ARGUEMENT

Issue No. 1 - The 13th Court of Appeals, correctly applied the *Dost* factors in its analysis and conclusion that the whole or full image was not a lewd exhibition of the genitals.

Issue No. 2 – The cropping of a portion of an otherwise legal image, does not create a new separate and distinct image, but if it does then the plain language

of Texas Penal Code section 43.26 should apply and the age of the child at the time the new image was created should apply.

ARGUEMENT

ISSUE #1

In presenting it's issues to this Honorable Court, the State has misconstrued the ruling of the Thirteenth Court of Appeals. Its seems that the whole premise of the States argument is that the Court should hold the evidence legally sufficient for the fact finder to have found the whole image to be lewd. The Sate argues that "even under the Dost factors, the Thirteenth Court of Appeals erred in rejecting the trial court's implied finding that the present image was a lewd exhibition of the genitals." (State Brief pg. 14). However, there was no finding that the "whole image" was lewd, either implied or explicitly by the trial court. On the Contrary it can be argued that the trial court implied that it was not lewd. The trial courts ruling was based solely on the cropped image, which was the only image the state was proceeding on. The stipulation entered into by the State and the Defendant state's " the image complained of in Count 1 of the indictment is **a portion of a larger photograph** entitled "Rosie" taken by photographer, Robert Mapplethorpe in 1976, and can be viewed at the Guggenheim Museum in New York City." The trial court in this case, never found the original image to be child pornography, but

rather held that the, “Defendant has altered the image and almost created a different image by blowing it up and changing it, and I know you have to take the image as a whole but when you create a different image then you can only take that image as a whole, so I'm going to find the defendant guilty on count one, pretty reluctantly, okay?” (Court of Appeal opinion). During the trial, the State was only proceeding on the cropped image, and not the larger whole image. For the State to argue or even imply that the trial court made any findings about the full image, let alone that the image was child pornography, is a gross misstatement of the facts and what occurred. The Thirteenth Court of Appeals was the first Court to make any findings as to whether or not the whole image was lewd or not.

The first issue presented to this Court by the Sate argues that the Court of Appeals erred in concluding that the image of a toddler with her genitals exposed, without any discernible reason for the exposure other than to arouse or offend the viewer, did not amount to a lewd exhibition of the genitals. The only entity that has made any findings about being aroused or offended by the exposure has been the State. Nowhere in its opinion did the 13th Court of Appeals state the reason for the nudity. Rather it held that “without evidence of Mapplethorpe's intent beyond what is in the record, and because there is not evidence other than the child's partial nudity, a rational trier of fact could not conclude that the full image depicts a “lewd” exhibition of the genitals under section 43.26” (Thirteenth Court of

Appeals Opinion pg 15).

The 13th Court of Appeals was the first and only Court to make any type of legal analysis as to whether the image amounts to a lewd exhibition of the genitals. In it analysis, it decided to adopt the Dost factors "as a useful but non-exclusive way of analyzing the sufficiency of evidence that an image depicts a lewd exhibition of the genital." (Thirteenth Court of Appeals Opinion pg. 9) Those factors the are:

1) Whether the focal pint of the visual depiction is on the child's genitalia or pubic area;

2) Whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) Whether the child is fully or partially clothed or nude;

5) Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) Whether the visual depiction is intended or designed to elicit a sexual response in the viewer. *United States v. Dost,* 636 F.Supp. 828

(S.D.Cal 1986).

Because the Trial Court never made findings or conclusions about the whole image, the Court of Appeals is the first and only Court in this case to make any findings about the image. In correctly reaching its conclusion that the whole image was not a lewd exhibition of the genitals, and thus not child pornography, the 13th Court of Appeals correctly applied the Dost factors in its extensive analysis.

ISSUE 2

The essential question presented to the Thirteenth Court of Appeals by the defendant was that if a image is not lewd, can a cropped out portion of that image be lewd for the purposes of possession of child pornography. While the 13th court of Appeals did not directly answer this question, it did so in a round about way. At trial the State argued that when Mr. Bolles cropped the image, he essentially made a new and distinct image, which could be lewd even if the whole image was not. The 13th Court of Appeals implied in its two holdings that an cropped image is part of the whole image and can not be considered pornography if the the whole image is not pornography. This is addressed in footnote 7 which states, "We stress that our holding regarding the cropped image is dictated by our holding the full image is not lewd....Nothing in the opinion addresses whether a person commits an offense under 43.26 by duplicating a photograph which itself qualifies as child

pornography while making changes to the resulting image." (Thirteenth Court of Appeals Opinion pg.17).

In it's brief the State argues that "under the court's reasoning, all child pornography made before the child turned 18 could instantly be transformed into non-pornographic images upon the child's 18th birthday by any alteration." (State Brief pg. 21) Again, the 13th Court of Appeals directly addressed this in footnote 7, when it state this opinion does not address the altering of already pornographic material. It could be argued that the opposite could happen and non pornographic images could become pornographic based upon who is viewing them. A medical book or even a website that has images of young children for a bonafide medical purpose, *ie* diaper rash, could be perceived to be pornographic if a person takes a picture of those images or even looks at them. If simply taking a picture of a part of an image creates a new separate and distinct image, there would be a slippery slope as to what and who would and could get prosecuted for possession of child pornography. If something is not child pornography to the millionaire art collector in River Oaks, then it can't be to the homeless sex offender either. "The First Amendment requires that redeeming value be judge by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Ashcroft v Free Speech Coalition,* 535 U.S. 234 (2002). The Supreme Court in

Ashcroft, struck down the Child Pornography Prevention Act of 1996 (CPPA), in part because the CPPA prohibits speech that records no crime and creates no victims by its production. *Ashcroft v Free Speech Coalition,* 535 U.S. 234 (2002). The child pornography laws are in place to protect children from becoming victims of sexual abuse and exploitation. The harm to the child occurs when the photographs are initially taken, and can continue if those illegal images are spread to others. If no harm or illegal acts take place at the initial taking of the photograph, it can not later become harmful. If a "bathtub" photograph is not pornography for the parent who took the photo, then it can be pornography to the neighbor who looks at it, even it if the context is changed. The mere fact that an individual might want to look at a legal image with illegal thoughts cannot make the image criminal. "The government cannot constitutionally premise legislation on the desirability of controlling a persons thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). "First amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end." *Ashcroft v Free Speech Coalition, 535 U.S. 234 (2002)*

The State cited a few federal cases that have addressed the issue of cropped or morphed images. These cases are distinguishable from the case at hand. The Photograph in the *Stewart* case, (*United States v. Stewart*, 729 F.3d 517, (6th Cir. 2013)), was of children sunbathing and playing nude on a beach, which was then

cropped and morphed. That photograph was presumably taken without permission of the children nor their parent's for the express purpose to later alter or morph. There was no facts as to the reason so we don't really know who or when the photos were taken. We don't know what the intention of the photographer was. Was it an innocent picture or was it taken expressly so that the image could later be cropped or manipulated so that it would become child pornography. The instant case involved an artistic photograph by a famous artist, Robert Mapplethorpe. "Mapplethorpe frequently made portraits of children. The offspring of friends and society figures whom he also photographed, Mapplethorpe's child models appear variously clothed and nude. In two early portraits from 1976 *Jesse McBride* and *Rosie*, his young subjects are sympathetically captured in natural, non studio environments and in poses that appear relatively spontaneous: five-year-old Jesse is perched nude atop an armchair in his mother's SoHo apartment, while three-year-old Rosie sits on an ornate garden bench, a propped-up knee inadvertently revealing her lack of underpants. Both children innocently face the camera without being self-conscious about their nudity. Most of Mapplethorpe's portraits of children were made within the more controlled conditions of the studio, stripped of settings and props and rendered in a rich palette of blacks, whites, and grays. Unlike his eroticized male nudes, the photographer's images of children are never cropped, nor are sections of their body blown up into fetishistic details. Their

bodies are aestheticized, but not as sexual beings; rather, in works such as *Melia Marden* (1983) and *Eva Amurri* (1988), they resemble the eternally childish *putti* of classical and Renaissance art." Guggenheim Collection online, http://www.guggenheim.org/new-york/collections/collection-online/artwork/4341. The photograph was taken in 1976, and is widely available for viewing in books, museums and on the internet. During its entire 40 years of existence it has not been found to be child pornography by any Court or Jury. We know that the photographer was taking the picture for artistic reasons, unlike in the *Stewart* case.

The State is trying very hard to complicate a very simple issue that 13th Court of Appeals didn't even need to address. As stated earlier, with its holding that the whole image is not lewd, the cropped portion can not be either. They are one and the same. The 13th Court of Appeals states in its opinion, "If we accept the State's argument that the cropped image is distinct from the full image and thus has distinct content, the image must have been made at a different time." (Thirteenth Court of Appeals Opinion pg. 16) However, they never addressed whether they accepted that argument, rather it has implied that it rejects that argument, and we would ask this Court to reject it as well. With that argument the State is trying to have its cake and it it too. On the one hand it is saying that the cropped image is a new and distinct image, and on the other its saying that the new image is not really new, but was made at the same time that the whole image was initially made. If

the cropped image is a new distinct image it becomes a distinct new image at the time it is made, not at a prior date. Using the State's logic, if a person has multiple copies of one image, they could be charged for the same image multiple times. The State could argue that each copy is a new and different image and thus each is prosecutable. This is a dangerous proposition.

As addressed in the Court of Appeals decision, "the ordinary meaning of the statutory language is that the minor depicted in the image must have been below the age of 18 when the image was created." (Thirteenth Court of Appeals Opinion pg. 16) If the legislature intended the State's version, it would have easily left the language of "at the time the image of the child was made." (Texas Penal Code Sec. 43.26) By adding that language it could also be argued that the Legislature never intended to criminalize what the State is trying to criminalize. They are trying to take the Statue and apply it in a way that wan ever intended. The State is asking the Court to give a meaning to the statutory language, that is other than the plain meaning of the statute.

The State brings up valid concerns about child pornography being transformed into non-pornographic material. (State's Brief pg. 21) Those concerns are only valid if their argument that the cropped image is a new and distinct image is upheld. If it is not then those concerns become moot, because the cropped image would then have the same characteristics of the whole image and would either be

or not be phonographic depending on the whole image. The Thirteenth Court of Appeals correctly ruled that it was not.

PRAYER FOR RELIEF

For the foregoing reasons, the Defendant requests that this Court up hold the judgment of the Thirteenth Court of Appeals.

Respectfully submitted,

/s/ Adam Rodrigue

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(l), is 3,088.

/s/ *Adam Rodrigue*

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CERTIFICATE OF SERVICE

This is to certify that, pursuant to Tex. R. App. P. 6.3(a), copies of this brief were e-served on November 21, 2016, on Petitioner's Attorney, Doug Norman.

/s/ *Adam Rodrigue*

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